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PATENT APPLICATION
09/074,496

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: James R. Albritton
Serial No.: 09/074,496
Filing Date: May 7, 1998
Group Art Unit: 3679
Confirmation No. 2329
Examiner: Michael P. Ferguson
Title: *Breakaway Support Post for Highway Guardrail End Treatments*

Mail Stop Appeal Brief - Patents

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

REPLY BRIEF

Appellant respectfully submits this Reply Brief under 37 C.F.R. § 41.41 in response to the Examiner's Answer transmitted June 23, 2010. Appellant filed an Appeal Brief on March 29, 2010 explaining clearly and in detail why the final rejections of Claims 37 and 40 are improper and should be reversed by the Board of Patent Appeals and Interferences. In the Examiner's Answer, the rejections are sustained.

ARGUMENTS

Appellant respectfully submits this Reply Brief under 37 C.F.R. § 41.41 in response to the Examiner's Answer transmitted June 23, 2010. Appellant filed an Appeal Brief on March 29, 2010 explaining clearly and in detail why the final rejections of Claims 37 and 40 are improper and should be reversed by the Board of Patent Appeals and Interferences (the "Board"). In the Examiner's Answer, the rejections are sustained.

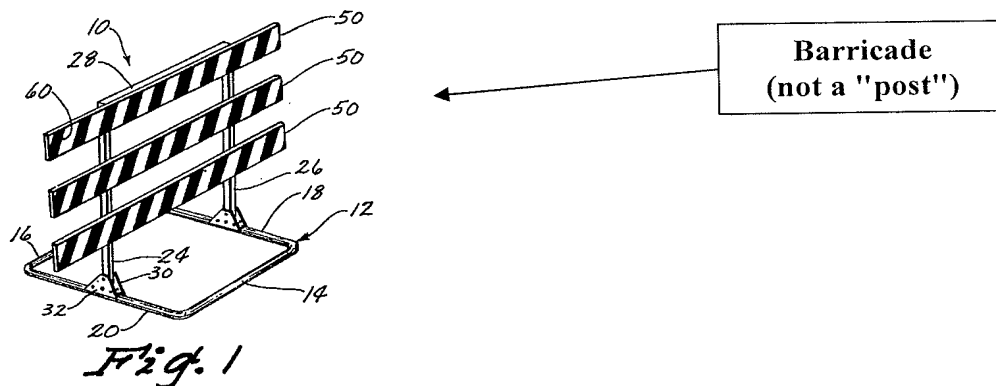
The Examiner rejects Claims 37 and 40 under 35 U.S.C. §102(b) as being anticipated by U.S. Patent 4,183,695 issued to Ernest J. Wilcox ("*Wilcox*")

In the Examiner's Answer, the Examiner responds to some of the arguments made by Appellant in the Appeal Brief with respect to the rejections indicated above. *See* Examiner's Answer, pages 3-7. Appellant replies to the Examiner's responses below.

Claims 37 and 40 each recites an upper post member having a weak impact axis and a strong impact axis and a lower post member disposed beneath and spaced apart from said upper post member. The final Office Action transmitted September 3, 2009 (the "Final Office Action") suggests that legs 24 and 26 of *Wilcox* read on the claimed upper post member and that rectangular base 12 reads on the lower post member. *See* Final Office Action, page 2. Appellant explained in the Appeal Brief that *Wilcox* does not disclose, teach, or suggest a lower post member disposed beneath and spaced apart from an upper post member as claimed. *See* Appeal Brief, pages 9-11.

In the Examiner's Answer, the Examiner attempts to change his position regarding the rejections of the claims based on *Wilcox*. For example, in the Final Office Action, the Examiner referred to *Wilcox*'s rectangular base 12 as a "pole" and contended that it was a lower post member because it was set up to make or indicate something: "pole 12 is set up to mark or indicate something; and thus constitutes as post, as is consistent with the definition provided by Applicant." Final Office Action, page 4. Now, in response to Appellant's arguments in its Appeal Brief showing that *Wilcox*'s rectangular base 12 is not a lower post member as claimed, the Examiner for the first time attempts to argue that *Wilcox*'s

However, notwithstanding the fact that this new position ignores the use of the word "post" to describe the post member as discussed below, under this theory *Wilcox* does not even disclose a guardrail post as claimed. Claims 37 and 40 both recite a "guardrail post" that comprises an "upper post member" and a "lower post member." In the rejections the Examiner contends that the "pair of legs 24 and 26" of *Wilcox* are an upper post member and that "rectangular base" 12 of *Wilcox* is a lower post member. See Examiner's Answer, page 4. However, using that position, the Examiner apparently contends that *Wilcox*'s "collapsible barricade" 10 would have to be the claimed "guardrail post." No person of ordinary skill in the art would view the *barricade* below and consider it to be a guardrail *"post."*



the modifier "post" in the recitation of the upper and lower members – Appellant could

have instead directed the claims toward a "guardrail post" comprising "an upper member" and "a lower member." However, *that is not the present case*. The current claims are directed towards a "guardrail post" that comprises "an upper *post* member" and "a lower *post* member." Thus, it is clear that the use of the word "post" describes vertical or upright members.

Therefore, for at least these reasons, Appellant respectfully requests that these rejections to Claims 37 and 40 be overturned and that Appellant's request for interference be granted.

CONCLUSION

Appellant has demonstrated that the present invention, as claimed, is clearly patentable over the prior art cited by the Examiner. Therefore, Appellant respectfully requests the Board to reverse the final rejection and instruct the Examiner to issue a Notice of Allowance with respect to all pending claims.

Although Appellant believes no fees are due, the Commissioner is hereby authorized to charge any additional fees and credit any overpayments to Deposit Account No. 02-0384 of Baker Botts L.L.P.

Respectfully submitted,
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Date: August 23, 2010

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